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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES WASHINGTON,

Defendant and Appellant.

D052152

(Super. Ct. No. SCD205860)

APPEAL from a judgment of the Superior Court of San Diego County,
Theodore M. Weathers, Judge. Affirmed.

BACKGROUND

On April 11, 2007, Cynthia L. was 46 years old, five-feet four-inches tall and weighed 150 pounds. Defendant and appellant Charles Washington was her boyfriend. He weighed 185 pounds, was six-feet two-inches tall, and was much stronger than Cynthia. On the afternoon of April 11, appellant and Cynthia went to a park. Afterward they went to a card room where they each drank a couple of beers and afterward got into an argument. During the argument, appellant accused Cynthia of having a sexual

relationship with one of his friends. Before parting and walking their separate ways, appellant slapped Cynthia. When they reunited at the truck they were both staying in, Cynthia told appellant she wanted to break up with him. In response, he grabbed and pulled her hair, slapped her and spit at her. He then forced her into the truck.

As he was forcing Cynthia into the truck, appellant told her: "Bitch, get in the truck. I ought to fuck you, then kill you." His statements were very dogmatic. He looked very angry, and vicious. Cynthia believed him and thought he was going to kill her. When she refused to have sex with him, he slapped her and took off her pants. She tried to stop him but he was choking, kicking and slapping her. While he demanded sex, he put his finger in her vagina, and her rectum. At one point he strangled her with both hands while she gasped for breath, begging him to stop. He continued to digitally penetrate her. During this time, a woman living in a nearby residence heard Cynthia screaming and heard thumping and moaning. Finally, after punching Cynthia in the nose with his closed fist, he pushed her out of the truck. He took her clothing, leaving her with only a jacket.

As appellant walked away with Cynthia's clothes, she followed, trying to get her pants and purse from him. Her purse held her identification, marriage license and her ex-husband's death certificate. Appellant threw her belongings over a fence. She was not able to get them because one eye was completely shut and she had only a jacket on. Two men eventually helped summon the police, who arrested appellant down the street. When contacted, Cynthia was drenched in blood from the blow to her nose.

Appellant's blows to Cynthia's face fractured her nose and the orbit of her left eye. She was taken to the hospital with her left eye completely shut, the left side of her face bruised and swollen, and with red marks on her neck. Her injuries required stitches and surgery on her nose.

Appellant was charged by the District Attorney for San Diego County with two counts of forcible rape with a foreign object (counts 1 and 2) in violation of Penal Code section 289, subdivision (a)(1), and assault by means of force likely to cause great bodily injury (count 3) in violation of Penal Code section 245, subdivision (a)(1). He was also charged with making a criminal threat (count 4) in violation of Penal Code section 422. With respect to count 3, he was charged with personal infliction of great bodily injury within the meaning of Penal Code section 12022.7, subdivision (e).

A jury found appellant guilty of all charged offenses and found the great bodily injury enhancement to be true.

Appellant filed a timely notice of appeal.

ANALYSIS

Appellant's main argument is that the conviction on count 4 is not supported by the evidence. We disagree.

In order to prove a violation of Penal Code section 422, the prosecution must prove that (1) the defendant willfully threatened to commit a crime which will result in death or great bodily injury, (2) the defendant made the threat with the specific intent that the statement be taken as a threat even if there is no intent to actually carry it out, (3) the threat, on its face, and under the circumstances, was so unequivocal, unconditional,

immediate and specific that it conveyed to the person threatened, a gravity of purpose and the immediate prospect of execution of the threat, (4) the threat actually caused the person threatened to be in sustained fear of his or her own safety, and (5) the threatened person's fear was reasonable under the circumstances. (Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

In evaluating the evidence surrounding the alleged threat, the court may take into account the words used, the subsequent actions and statements by the defendant and the past history of violence between the person threatened and the defendant. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013, *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220-1222; *People v. Garrett* (1994) 30 Cal.App.4th 962, 967.) The words need not reference a particular time or specific manner of execution; they need only be of an immediately threatening nature and convey the immediate prospect of execution. (*In re David L.* (1991) 234 Cal.3d 1655, 1660.)

Here, *before* he forced Cynthia into the truck, appellant threatened: "I ought to fuck you, then kill you." The threat was willful. As appellant stated when he was booked, he hit her, and penetrated her, and "always wanted to do that," "[i]t was a rush," "exciting."

Appellant's words were said with the specific intent they be taken as a threat. His words were threatening, dogmatic, and his look very angry and vicious. Appellant's argument that if he had really intended his threat to be taken seriously he would have done far more damage than he did is startling. He choked Cynthia for a full minute or two, leaving her gasping for breath and pleading for him to stop. He broke her nose,

leaving her covered in her blood. He broke the orbit of her eye, leaving her eye swollen shut. She needed surgery and stitches. If these acts were not sufficient to demonstrate the seriousness of appellant's threats, it is frightening to imagine what acts he would consider serious enough. Moreover, appellant's acts of violence were certainly consistent with those perpetrated on Cynthia in the past when nearly every day he pushed, slapped, and kicked her around. On one prior occasion after throwing beer cans at her, pulling her hair and slapping her, the police were summoned. Based on his past conduct toward her, Cynthia had ample reason to feel that appellant was serious in his threats and that the threats carried a gravity of purpose and immediate prospect of being carried out, causing Cynthia to be in sustained fear for her safety. These were not, as appellant suggests, words of a mere angry outburst. Nor were they momentary or fleeting. They were meant as a prelude to what was about to befall Cynthia.

Appellant also asserts the threatening words somehow "merged" into the assault. However, a criminal threat is not an element of assault, and the evidence of a threat can be used to support both a felony assault under Penal Code section 245, subdivision (a), and a separate count of a criminal threat under Penal Code section 422. (*People v. Steele* (2008) 164 Cal.App.4th 1195, 1207.)

Nor can it be said the multiple punishment proscription of Penal Code section 654 applies here. That proscription does not apply where the evidence discloses the defendant entertained multiple criminal objectives that were independent of each other rather than merely coincidental to each other. (*People v. Perez* (1979) 23 Cal.3d 545, 551-552.) Here, appellant's threats began outside the truck before he pushed her into the

truck where he then raped and assaulted her. The specific intent required by Penal Code section 422 is that appellant must have intended his words be taken as a threat. This intent is far different than the intent required for forcible rape with a foreign object or assault by means of force likely to cause great bodily injury.

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.